Office Supreme Court U.S.
FILED
MAR 13 1901
JAMES H. McKENNEY,
Clerk

No. 201.

Sup. Ct. of Illinois

D. C.

17,639.

Filed Mar. 13, 1901.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 201.

THOMAS F. FARRELL et al., *Plaintiffs in Error,*
vs.
WEST CHICAGO PARK COMMISSIONERS, *Defendant in Error.*

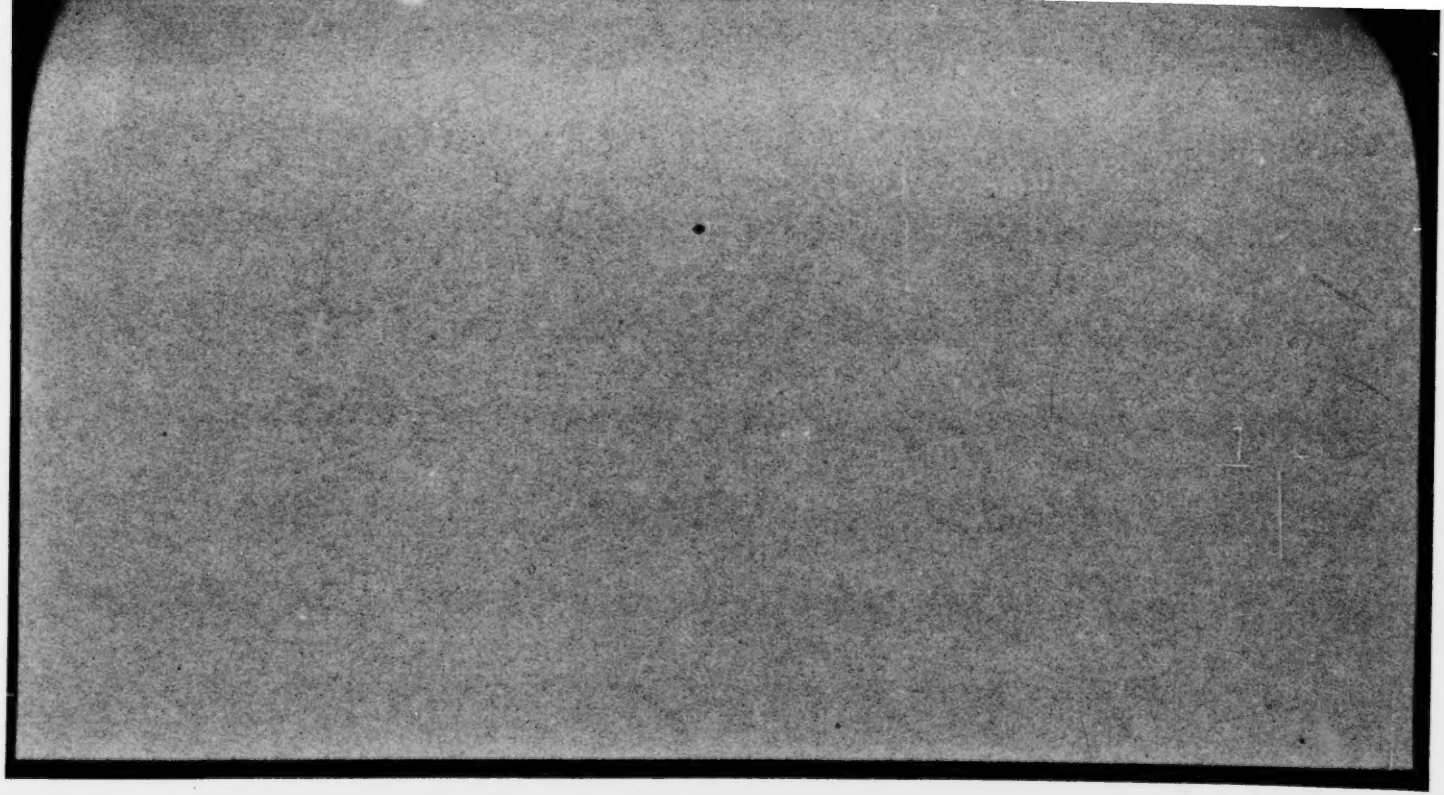
In Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR,

ON ADDITIONAL ASSIGNMENTS OF ERROR.

ROBERT A. CHILDS,
CHARLES HUDSON,
COUNSEL FOR DEFENDANT IN ERROR.

Brandreth & Wilson Printers, Syracuse.



IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

No. 201.

THOMAS F. FARRELL et al.,
Plaintiffs in Error,
vs.
WEST CHICAGO PARK COMMISSIONERS,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

Argument of the Defendant in Error,

On points raised by the Additional Assignments of Error.

Since this case was placed on the daily call, for hearing, the plaintiffs in error have seen fit to file additional assignments of error, eleven in number, covering some six printed pages. Some of the points now raised were anticipated in our original brief and argument, but others, raised now for the first time, were not covered.

We have already stated the "federal questions" which plaintiffs in error now seek to raise were not raised or argued in either the trial court or the Illinois Supreme Court. The only reference in the County Court to the United States Constitution, amendments thereto, or to the statutes of the United States, is contained in the twelfth objection (Pr. Rec., 19), wherein plaintiffs in error complained that the "statute under which the present proceedings are being conducted is contrary to the Constitution of the United States, and in conflict with

section 10 (first) of article 1 thereof." This is the section prohibiting "*ex post facto*" legislation by the states. In the Supreme Court of Illinois no reference whatever to any federal question was made in either the assignments of error or the decision of the court. (Pr. Rec., 64 and 68.)

These questions are, therefore, now raised for the first time, and as shown in our original brief (19–21) they are not entitled to consideration by this court. Federal questions presented for the first time in this court, are raised too late.

The new assignments of error are numbered consecutively with the old ones, probably to conceal the fact, as far as possible, that they *are* new, and to make it appear that they were filed with the original record. They were doubtless prompted by the arguments contained in our brief, in *Lombard* v. *West Chicago Park Commissioners*, No. 160, argued but a few weeks ago, where this same assessment was under consideration.

I.

PLAINTIFFS IN ERROR WERE FULLY HEARD ON THE QUESTION OF BENEFITS, AND THE JURY DETERMINED THAT THEY HAD NOT BEEN ASSESSED MORE THAN THEY HAD BEEN BENEFITED, NOR MORE THAN THEIR JUST PROPORTION OF THE COST.

Counsel refer frequently, in their brief, to the "Estimate of Cost" by which the amount to be raised by assessment was determined, and quote with great unction a sentence therein contained which indicated the approximate amount per front foot that the improvement would

cost, and conclude therefrom that "The question of benefits could not have been considered." But they carefully avoid all mention of the long trial before the jury where the question of benefits *was* carefully considered, and they forget to abstract the verdict of the jury that the plaintiffs in error "have not been assessed more than the amount of the benefits conferred." (Pr. Rec., 22.) Not the slightest mention of that jury trial or of the resulting verdict, is made, throughout their entire brief. The omission is, to say the least, significant.

Concerning that sentence in the Estimate of Cost, counsel say, "The benefits from such proceedings and the limit to the charge on separate parcels of land, are, therefore, disregarded. This was the fatal defect in the ordinance referred to in *Norwood* v. *Baker*." And in commenting on *Norwood* v. *Baker*, they quote the following: "The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost."

Lest the foregoing statements of counsel for the plaintiffs in error, coupled with their omission of all reference to the jury trial, may mislead the court, we beg to refer to the record on that subject.

(*a*.) Section 1 of the ordinance for the improvement provided that it should be paid for by *special assessment* to be assessed in the manner authorized by the act of 1873. This section of the ordinance is *not* the one that was declared void. (Pr. Rec., 26.)

(*b*.) The statute of 1873 last referred to provided

that the procedure for levying the assessment, after filing the petition, should conform to that provided for levying of assessments in Cities and Villages, under Article IX of the Cities and Villages act. We print the act of 1873 in our original brief, at page 59.

(*c.*) Article IX last referred to contains a provision for a trial before jury on the question of benefits, as follows: "If it shall appear that the premises of the objectors are assessed more or less than they will be benefited, or more or less than their proportionate share of the cost of the improvement, the jury shall so find, and shall also find the amonnt for which such premises ought to be assessed, and judgment shall be rendered accordingly." We print this statute in our original brief at page 75.

(*d.*) Plaintiffs in error filed in the County Court their objection 19, as follows: "These objectors further state that their respective lots and pieces of land are not benefited by said alleged improvement to the amount of the assessment thereof, nor to any amount whatever." (Pr. Rec., 12; Rec., 33.)

(*e.*) On May 24, 1898, a jury was called and sworn to try the "question of benefits,' the objectors being represented in court by Geo. W. Wilbur, their present counsel. (Rec., 82; Pr. Rec., 21.)

(*f.*) Thereupon the jury were taken out to view the premises, May 25, 1898. (Rec., 165; Pr. Rec., 45.)

(*g.*) That same day evidence was introduced on both sides, instructions were given by the court to the jury and the jury retired to consider as to their verdict. (Rec., 183; Pr. Rec., 55.)

(*h.*) Then the jury rendered their verdict as follows: "We the jury find the issues for the petitioner herein,

and find that the property of the objectors is not assessed more nor less than it will be benefited by the proposed improvement, nor more nor less than its proportionate share of the cost of said improvement." (Rec., 83; Pr. Rec., 22.)

(*i.*) Thereupon, after motion for new trial was filed, argued and overruled, the judgment of the court was entered confirming said assessment. (Rec., 85; Pr. Rec., 22.)

From the foregoing citations of the statutes and of the record in this case it not only appears that ample *opportunity* was given to the plaintiffs in error to be heard on the question of benefits, but also that they *were in fact heard* and the issues were found against them by a jury, in the ordinary and usual way. In both respects this case differs from *Norwood* v. *Baker*, for in the Norwood case no opportunity was given to the property owners to be heard on the question of benefits, while in our case the opportunity was not only given—it was taken advantage of and the owners *were heard*.

The distinction which counsel attempts to draw between a special assessment and a special tax is, in this case the merest quibble and play upon words; for the statutes of Illinois have long authorized both special taxes and special assessments, and at the time this assessment was levied, the trial by jury of the question of benefits was guaranteed in both cases, the special tax as well as the special assessment. The provision regarding an assessment is quoted above. That regarding a special tax is found in Sec. 17 (133), of Article IX of the Cities and Villages act, and is as follows: "Provided that no special tax shall be levied in excess of the special benefits. * * * The question of benefit shall be tried in the

same manner as in proceedings by special assessment." There appears in the brief of counsel for the plaintiffs in error what purports to be a copy of this section of the statute; but this proviso, which was added in 1895, three years before the trial in the present case, is for some reason omitted. The proviso was in force when the present assessment was made, and we respectfully request the court to verify the accuracy of our quotation, and the inaccuracy of that of plaintiffs in error, by reference to the section as found in Starr & Curtiss's Rev. Stat., Ill., Ed. 1895, page 748.

What legitimate object the plaintiff in error can have in hinting, insinuating, and broadly stating that "the assessment was made in utter disregard of benefits" we cannot understand, for the exact contrary is the fact; and why they insist that they are unduly assessed, after the jury has found the contrary, we do not know. Neither does it appear by what tribunal they desire to have this question tried, if not by a jury.

We insist that this is a question of fact; that it has been tried by a jury in the usual way; that the question is not a "federal question;" and that the United States Supreme Court will not dwell to *review* the verdict of the jury, much less to set it aside.

II.

CHANGE IN IMPROVEMENT.

The 21st assignment of error, being an additional assignment filed within the last few days, is based on the allegation that the improvement as constructed differed in some details from that described in the original ordinance.

This objection was filed in the trial court, but not as a want of due process of law, or as a federal question. (Pr. Rec., 18; Obj., 5.) At the trial no evidence whatever was offered by the objectors on this point, but after the trial a very voluminous affidavit was filed in support of a motion for a new trial, which set up some alleged "newly discovered evidence" on this point. The denial of this motion by the trial court was not assigned as error in the Illinois Supreme Court, nor was any suggestion made that there was any violation in this respect of a United States Statute or the United States Constitution. (Pr. Rec., 64.)

The Illinois Supreme Court, however, in its decision says:

> "The affidavits as to the newly discovered evidence filed in support of motion presented by appellants to set aside the order overruling their motion for new trial were insufficient to entitle the appellants to a favorable decision on the motion. The testimony relied on as newly discovered, so far as it is in any way important, was contained in the ordinance, plans, specifications and estimates, which were, of course, open to the inspection of appellants, indeed, composed a part of the record in this cause, and could have been known at the time of the trial by the exercise of requisite diligence. The alleged changes in the manner of the construction of the improvement referred to in said affidavits, so far as at all material, were such only as were apparent to observation and by the exercise of even slight diligence would have come to the knowledge of every one interested." (Pr. Rec., 71.)

Furthermore, it has been held repeatedly in Illinois that a change in the manner of constructing an improvement is not an objection to the assessment, but the remedy of an aggrieved party is by mandamus against the corporate authorities whose duty it is to make the

improvements as paid for by the property owners assessed. (*Haley* v. *Alton*, 152 Ill., 113.)

So it will be seen that the change in construction (if any there was) was not valid ground for objections to the assessment even if urged in time; it did not raise any federal question; it was not urged at the trial; and the decisions of the Illinois courts concerning this objection rest on the ground that the evidence was not "newly discovered" and was therefore inadmissible.

We respectfully urge that the decision was right, and even if wrong, no federal question for this court to decide is presented.

III.

PRECEDING PETITION.

In number 19 of the additional objections recently filed, the plaintiffs in error urge that the assessment was erroneous because there was no preceding petition for the improvement by the property owners.

We do not see what federal question would be involved even if the statute or decision dispensed entirely with a preceding petition. Our attention has not been called to any provision of the United States Constitution protecting citizens against assessments without such preceding petition.

But in the present case there was such provision for petition, and the court did not disregard it. There was such petition in this particular case, and the court so finds.

The ordinance for the improvement contains the following (Pr. Rec., 25):

"Whereas, said Board of West Chicago Park

> Commissioners have also submitted to the corporate authorities of the Town of West Chicago *a petition* of the owners of a majority of the land fronting on the said proposed improvement duly verified by their engineer, and,
>
> "Whereas, the corporate authorities of the Town of West Chicago have found by inspection that said petition contains the duly authenticated signatures of the owners of a majority of the land fronting on Douglas boulevard or Douglas Park boulevard from the south line of Garfield Park to the west line of Douglas Park, as provided by law."

The above ordinance was introduced in evidence. (Pr. Rec., 25.) It was also attached as Exhibit D to the petition herein. (Pr. Rec., 34.)

The objectors did not then, at any time, call for the original petition nor was it offered or introduced in evidence, the court holding that the ordinance of the West Town authorities, to whom said petition was addressed, in finding that it was duly executed, was *prima facie* evidence of the fact that they had such petition.

The Illinois Supreme Court approved this reasoning, saying:

> "The (trial) court properly declined to receive oral testimony as to the contents of the petition of the consenting property holders, for the reason the petition itself was the best evidence, and its absence was not accounted for." (Pr. Rec., 69.)

And on the authority of *Cummings* v. *West Chicago Park Commissioners*, 181 Ill., 136, where the same point had been urged, it was again held that the ordinance of the West Town was *prima facie* evidence that it had received the petition as said ordinance stated.

A mere question of burden of proof, or at best a question of evidence, was involved. It was decided cor-

rectly. But even if decided erroneously, it did not involve any question of constitutional law, but only a matter of local practice.

IV.

THE DECISION OF THE ILLINOIS SUPREME COURT IN THIS CASE IS NOT A DEPARTURE FROM ITS PREVIOUS ADMINISTRATION OF ILLINOIS LAW.

Counsel have filed an additional assignment of error complaining that the decision in this case is a departure from the established construction of the Illinois constitution, in that it gave effect to the ordinance of 1893, which had previously been held "absolutely void." (New assignment of error, No. 25, brief of plaintiff in error, 56.) They argue that this new (?) doctrine is in effect legislation—judicial legislation—by which their property is taken without due process of law, and therefore violates the fourteenth amendment to the Constitution of the United States.

Our original brief made no mention of this alleged "departure" for the reason that the point had not been raised, either in the trial court, the Supreme Court or in the original assignments of error filed in this court. It is now raised for the first time, and under the established doctrine of this court it is not entitled to any consideration. It should have been presented and argued before the State Court, otherwise there is no decision "against the title, right, privileges or immunity specially set up or claimed." (Rev. Stat. U. S., Sec. 709.)

We have already shown that the ordinance in question was not wholly void, that it had not been held to be void, except in part, and that the part of the ordinance which

ordered the improvement was always held valid. The only part that was void was that section providing that the assessment should be divided into installments.

The former decisions which counsel say are departed from in this case are merely those holding that there can be no assessment without a prior ordinance ordering the improvement, and directing that an assessment be levied to pay for the same. There was such ordinance here, and those authorities are neither overruled nor questioned in this case. To that extent this ordinance was, and is, valid, and no violence whatever is done to the established doctrine previously laid down.

The cases cited by counsel for plaintiff in error to the point that a state court may not depart from its former rulings differ from the present case in at least two important particulars. First, they relate to issue of *bonds* which, being issued under one construction of the law, are held valid after the State Court has changed its ruling. The essence of the doctrine is that the bondholder is entitled to rely on the doctrine in force when he made his contract. In our case there is no bond issue and no contract.

Second. The cases cited all went up from United States Circuit Courts, and not from State Courts. In reviewing the United States Circuit Court all questions of law are reviewed, whether they present federal questions or not, while in reviewing decisions of the highest court of a state, this court reviews federal questions only. The distinction is carefully noted in *Davidson* v. *New Orleans* (96 U. S., 97). The present case is NOT an appeal from a Circuit Court of the United States, but *is* brought from the Illinois Supreme Court. Therefore,

only federal questions are involved, and this is not a federal question.

New Orleans v. *Clarke*, 95 U. S., 644, was heard on writ of error to the United States Circuit Court for the District of Louisiana, and was an action on coupons for interest on bonds.

Anderson v. *Santa Anna*, 116 U. S., 356, was heard on writ of error to the Circuit Court of the United States for the Southern District of Illinois, and was an action on bonds and coupons.

Thompson v. *Perrine*, 103 U. S., 806, was brought to this court by writ of error to the United States Circuit Court for the Southern District of New York, and was an action on coupons for interest on bonds.

Douglass v. *Pike County*, 101 U. S., 677, was brought to this court by writ of error to the United States Circuit Court for the Eastern District of Missouri, and was an action on certain interest coupons.

St. Joseph v. *Rogers*, 16 Wallace, 644, was also brought to this court by writ of error to the United States Circuit Court of Southern District of Illnois, and was an action on bonds.

Thompson v. *Lee County*, came to this court on writ of error to the Circuit Court of the United States for the District of Iowa, and was an action on county bonds.

These are all the cases cited on this point by counsel for the plaintiffs in error, and merely establish that the United States Courts will either follow their own judgment as to the legality of municipal bonds, or if they follow state decisions they will follow those decisions and that doctrine which was recognized at the time the bonds were issued rather than subsequent modifications of it. It is in the nature of the doctrine of estoppel. The

municipalities are estopped from denying the decisions of their own courts which were in force at the time they issued their bonds and made their contracts.

But there is no such question presented by the record in this case. There is no bond issue, no contract, no buying of municipal obligations, no impairment of contract, and nothing on which to hang any doctrine of estoppel.

We repeat that there is no departure from established decisions, and even if there had been the plaintiffs in error had acquired no vested rights, or contract rights, which are impaired thereby. We simply ask them to pay the amount the jury found they were benefited.

Respectfully submited.

ROBERT A. CHILDS,
CHARLES HUDSON,
Counsel for Defendant in Error.